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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1128.

JAMES HYMORE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In its statement of the case the respondent, State of Ohio, recounts a partisan account of the alcoholic beverages the petitioner supposedly consumed the morning in question and the evening before. On appeal to the Supreme Court of Ohio the prosecution justified its conduct by claiming the sole purpose was to show that the defendant-petitioner was not on duty at the time. But what is the present purpose of the State in dwelling upon how much the defendant supposedly had to drink? The amount he had to drink and his sobriety was not, at the trial, *and certainly not in this appeal,* in issue. Nor is any issue present as to whether or not he was on duty. It is submitted that the prosecution's one-sided picturization of the defendant is intended to prejudice him in the eyes of the reviewing court. It meets no other conceivable issue in this case.

The evidence showed the defendant was on duty when he chose to be on duty. The state of his sobriety was not

an element of the offense, nor does it excuse manslaughter. One can well imagine the attitude of the prosecution if the defense had been that because of the amount he drank the defendant was incapable of forming the criminal intent of pointing a gun or intentionally shooting a gun. The prosecution then, as we do now, would argue vehemently that the amount the defendant had to drink is collateral to the charge of manslaughter. The brief of the State of Ohio is an emotional appeal that the defendant should be punished because he erred.

Of the seven witnesses present at the scene, only one was asked by the prosecution respecting the defendant's sobriety. She was the barmaid who testified he was inebriated upon his arrival at 11 P.M., but nevertheless, she served him 8 or 10 double shots of whiskey in the space of three hours. But incredibly, nine minutes after the unfortunate death, the defendant was sober and "normal"! If it was and is important and a proper part of the prosecution's case, why was this question not asked of the six other eyewitnesses to the tragedy? The record shows that the decedent was there keeping a date with the barmaid, that she socialized with the decedent, and that she was his companion. A reading of her testimony demolishes her credibility in that it was not corroborated by any other eyewitness. But if she was right, is it not even more important that the sheriff and the coroner, and the deputy sheriff, show that they explained to the defendant his constitutional rights so that he understood them before testifying as to his conversations?

We should like also to point out that unlike our petition for writ of certiorari, the respondent's brief gives no page references to the record to support its factual statements. In several instances the record does not appear to support the factual statements made.

The Brief in Opposition makes it appear that petitioner relies on *Miranda v. Arizona,* 384 U. S. 719, which had not been decided at time of trial. Such is not the case. Petitioner does rely on *Escobedo v. Illinois,* 378 U. S. 478, and *Jackson v. Denno,* 378 U. S. 368, and the trial court's correct statement of the requirements laid down by the Supreme Court of the United States. (R. 16.) If the trial court was correct, the prosecution committed error in not honoring and making an end run around these decisions.

The State, in its brief, argues that Questions 2, 3 and 4 propounded by us do not concern federal matters. Inasmuch as they explicitly are concerned with "due process of law" and "equal protection of the law," we disagree. The State of Ohio, however, ignores our arguments that go to these questions.

Respectfully submitted,

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